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Supreme Court of the United States

No. 453

ATLANTIC COAST LINE RAILROAD COMPANY,
Petitioner,

against

HANNAH R. TEMPLE, Administratrix of the Estate of Joseph R. Temple, Deceased, Respondent

Brief of Respondent in Opposition to Petition for Writ of Certiorari

JOHN F. WILLIAMS (Williams, Croft & Busbee), Aiken, S. C.
R. E. WHITING, Columbia, S. C.,
Counsel for Respondent.

THE R. L. BRYAN CO., COLUMBIA, S. C.
11-19-31-60

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STATEMENT OF THE CASE

This case (arising under the Federal Employers' Liability Act for the death of Jos. R. Temple, Engineer, in the employ of the defendant, who, while operating a passenger train leaving Augusta, Ga., for Sumter, South Carolina, was killed in a wreck caused by the derailment of his engine) was brought by plaintiff in Florence County, where the intestate had lived; the Town of Florence, the County Seat, being also a central point of defendant's railroad operations.

Mr. Arrowsmith, an attorney of the Florence bar, represented the plaintiff in bringing the suit, was connected with the case throughout the proceedings in the State Court; but has died since argument in the State Court; and, therefore, his name does not appear on the brief filed by respondent in this case.

The case was removed at the instance of the defendant to Aiken County, where the wreck had occurred; where presumably jurors from the vicinage would be less likely to be swayed by any consideration or friendship for the deceased, or sympathy for his orphaned and helpless children; and where local witnesses, employees of the defendant company, or others who had observed the conditions at the scene of the wreck, might be expected to have more weight before the jury in their testimony.

The earning capacity of deceased was from $225.00 to $250.00 per month at the time of his death (folios 31, 374); he had three children (whose ages were, respectively, nine, eleven and fourteen years); and his mother (then about seventy years old) was living with him, taking care of his children (folios 21, 22).

The specifications of negligence relied upon by plaintiff will be found on page 3, folios 10-11, of the transcript of record. It is there alleged that employees of defendant, working on the track on the afternoon before the accident, failed to properly spike and bolt one of the rails and failed to keep

the same properly spiked and bolted, and that, when the engine and cars came upon this rail, it did not hold in the position it should have held to support the engine and cars, but one of the rails spread, thus causing the engine to turn over and the resultant death of plaintiff's intestate.

In defendant's answer, it is admitted (folio 21) that one of the rails on the track at the point where the accident occurred did not hold; but negligence on the part of defendant was denied; and defendant alleged that the defective condition of the rail was caused by malicious act.

An affirmative defense was also set up in the answer (folios 24-26) setting out defendant's contention that the derailment was the result of malicious act, and that investigation instituted by defendant led to the arrest of one George Rivers and his conviction for the wrecking of the train.

On trial of the case, defendant made no effort to prove motive for the vandalism alleged to have caused the derailment, and did not, otherwise than by offering to introduce the Court record of the conviction of George Rivers, make any effort to prove that George Rivers (a negro) was anywhere near the wreck or had any connection with it. Defendant offered, however, the Court record of the George Rivers case to prove his conviction. This was excluded by the trial Judge (folio 705).

The record of the Governor's pardon issued to George Rivers, which was offered in evidence by plaintiff following the effort of defendant to introduce the record of his conviction, was likewise held inadmissible (folio 706).

The derailment occurring about 3:10 A. M. a few miles from Augusta, and the railroad officials there receiving prompt notice, a number of such officials (the superintendent, roadmaster and wrecking foreman of the C. & W. C. R. Co., an affiliated company owning the railroad tracks on which the wreck occurred, were at the place of the wreck by 5:30 A. M. It does not appear from the record, however, that the plaintiff, living at Florence, S. C., with the three small children of the deceased engineer, a long distance away

from the place of the wreck, was even notified by the railroad company of the accident; or that she had any opportunity to make investigation of the cause of the derailment before the wreckage was cleared up.

The plaintiff's reliance at the trial was, therefore, quite naturally based solely on testimony concerning the occurrence of the accident and the surrounding circumstances.

Of the two witnesses called upon to testify for plaintiff, one of the witnesses, Dobson, had been summoned by defendant. The explanation made however by the defendant concerning the circumstances of the derailment did not satisfy the jury; and a verdict was awarded against defendant in the sum of $20,000.00. The trial Judge refused defendant's motion for a new trial. The defendant did not, and could not, complain of the charge. The appeal to the Supreme Court related to the sufficiency of the testimony; there were no exceptions argued to the rulings of the Judge on the trial or to his charge.

The case now comes on petition for *certiorari* to this Court on assignment of error wherein petitioner contends that, "there is no substantial evidence whatever in the record to show negligence by the section force in maintaining the track at the place of the wreck, as alleged, but the undisputed evidence tends strongly to show that the wreck was caused by the criminal acts of third persons."

ARGUMENT

Summary of Argument

Since the single issue of this case is the sufficiency of the testimony to make out a case justifying submission to the jury, an analysis of the testimony has been made at considerable length. Black type has been used to emphasize parts of the testimony that are deemed most pertinent to call attention to conflicting statements of witnesses or circumstances permitting inferences favorable to plaintiff.

As applicable to the consideration of the testimony, respondents' argument, with supporting authorities, is, in substance, as follows:

(I)

The occurrence of the derailment and the surrounding circumstances permitted an inference of culpability on the part of the defendant; made out plaintiff's prima facie case; and presented a question of fact for the defendant to meet with an explanation.

Supporting Authorities: *Southern Railway Company-Carolina Division v. Bennett, Admrx.*, 233 U. S., 80, 85 (affirming 98 S. C., 42); *San Juan Light Company v. Requena*, 224 U. S., 90, 98; *Spokane & Inland R. Company v. Campbell*, 241 U. S., 497, 505; *Travelers Insurance Company v. McConkey*, 127 U. S., 661, 667; *Sweeney v. Erving*, 228 U. S., 233, 240; *Wright v. Railroad*, 127 N. C., 225, 229; *Winslow v. Norfolk Hardwood Company*, 147 N. C., 275, 276; *Duvall v. Receivers S. A. L. Railway*, 152 N. C., 524 (Writ of error dismissed, 225 U. S., 477); *Stewart v. Railroad*, 157 N. C., 687; *Wallace v. Power Company*, 176 N. C., 558; *Craig, Admr. v. Suncrest Lumber Company*, 185 N. C., 560; *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562; *Manning v. Chicago, etc., R. Company*, 135 Minn., 229; *Conner v. Atchison, etc., R. Co.*, 189 Cal., 1; The Columbia, 25 Fed. (2d) 516 (affirmed by Circuit Court of Appeals, 2nd Circuit, 25 F. [2d], 518); *American Glycerine Company v. Brown* (C. C. A., 5th Circuit), 30 Fed. (2d), 316; *Chesapeake & O. R. Company v. Smith* (C. C. A., 6th Circuit), 42 Fed. (2d), 111; *Chesapeake & O. R. Company v. Wells* (C. C. A., 6th Circuit), 49 Fed. (2d), 251; *Baltimore, etc., R. Company v. Hill*, 84 Ind. App., 354 (Certiorari denied, 273 U. S., 738); *Central R. Company v. Peluso* (C. C. A., 2nd Circuit) 286 Fed. 661 (Certiorari denied, 261 U. S., 613); *Plumb v. Richmond Light & R. Company*, 233 N. Y., 285.

(II)

The explanation offered by defendant left issues of fact for the jury; the proof being conflicting; and the circumstances testified to justifying countervailing inferences and suggesting doubt as to much of the testimony.

Supporting Authorities: *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit) 234 Fed., 562; *Southern Railway Company, Carolina Division, v. Bennett, Admrx.*, 233 U. S., 80; *Spokane & Inland R. Company v. Campbell*, 241 U. S., 497, 505.

(III)

The failure of defendant to produce at Court the tools discovered at the place of the wreck (a discovery relied upon by defendant as evidencing the malicious act of a third person as cause of the derailment) lays defendant open to the suspicion that the stronger evidence afforded by the production of the tools at Court (so that a test could have been made to see whether the wrench had been, or could have been, used on the nuts that were taken off the bolts holding the rail in place) would have been to deendant's prejudice.

Supporting Authorities: *Clifton v. United States*, 4 How., 242, 248; The Frances, 8 Cranch, 348, 353; *Brig Struggle v. United States* 9, Cranch, 71, 74; *Runkle v. Burnham*, 153 U. S., 216, 225.

(IV)

The issue, depending on the effect or weight of the evidence offered in rebuttal of the prima facie case made out by plaintiff, was one to be decided by the jury.

Supporting Authorities: *Gunning v. Cooley*, 281 U. S., 90, 94; *Chesapeake & O. R. Company v. Martin*, 283 U. S., 209, 214; *Chicago, etc., R. Company v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562.

In *Chicago v. Irving, supra,* where a *prima facie* case was made out by showing that there was a derailment which caused the injuries complained of, and the railroad produced circumstantial evidence tending to show that the derailment was not due to its negligence in track inspection, but to vandalism, it was held that the question of negligence was wholly for the jury, and was properly submitted by instruction requiring plaintiff to show negligence by a preponderance of the evidence. Examination of the case shows that in many respects the circumstances and proof in connection with the derailment were closely similar to the circumstances and proof in the case at bar. The case is one, therefore, which seems of the highest value in this consideration. In discussion of the sufficiency of the testimony to warrant the submission of the case to the jury, the Circuit Court of Appeals said:

"The defendant carrier offered its evidence. Whether it met or made a stronger case than plaintiff made was for the jury to say under proper instructions by the Court. . . . The defense relied upon evidence largely circumstantial, tending to show that some person unknown to it had deliberately pulled some spikes, removed angle bars, and displaced a rail. This may have been a correct way of accounting for the derailment, but the reasonableness of such a conclusion was evidently not clear to the jury and to the District Judge, and, as we read the testimony, is by no means a satisfactory explanation to us. The testimony of the method and times of inspection showed that the duty of the inspector was to inspect four tracks, each one being between 1½ and 2 miles in length, and that he devoted two hours daily to the work. The jury were not obliged to accept it as a fact that in such an inspection the one making it could and would detect the joints and bolts on the rails of the several tracks; nor were they obliged to believe that the roadmaster's inspection made on a fast-moving car was a sufficiently vigilant method to have discovered such a defect as the jury found must have existed. The whole ques-

tion of whether there was negligence became one for determination by the jury. *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S., 401, 19 Sup. Ct., 233, 43 L. Ed., 492. They saw the principal witnesses and heard them give their testimony; and it was for the jury to say whether the defendant rebutted the *prima facie* case of the plaintiff."

ANALYSIS OF TESTIMONY

Plaintiff's witness, Dobson (who was subpoenaed by both sides), swore that he is proprietor of a gravel pit and runs a mercantile business at Beech Island; he got to the wreck about 6:30 o'clock in the morning; the engine and tender and two coaches were off and everything that could burn about the engine had burned off. The plaintiff's intestate had been removed (the wreck had occurred some three hours before).

Besides seeing that the rail was all bent up Mr. Dobson saw spikes and bolts where the track was loose, lying on the cross-ties; that three or four ties "were taken loose"; and he thought that the "flanges or angle plates were on the Augusta end of the rail." An angle plate has six bolts in it, three in each end of the rail. There was a dent and it looked as if it had been pushed in and you could see the dent about the center of the middle of the rail.

"Q. A train going towards Augusta would not hit the rail that way?

"A. No sir, it would push it back in, it looks like.

"Q. But one coming from Augusta would hit it?

"A. Yes, sir."

This witness was around the scene of the wreck pretty well all day and he did not know who mentioned it but thought he mentioned it himself that the train looked like it had been wrecked and there might be some tools. He went back and looked (folio 48), and found the place where somebody walked out, two people, and found a crowbar that you could pull spikes with and a wrench. These were

lying out behind some little bushes, just off the right of way in a gravel pit that had been dug there for some time. He did not recall seeing the section hands working there that week but thought he had seen them working there about the week before. He owned a gravel pit and had seen the section hands working there the week before and they had done some work for him, too. This witness said in referring to the rail (folio 57), "it had to be spiked in so that the wheel could hit it to make that dent," answering a question on cross-examination; and on said cross-examination he said he thought he had seen Mr. Leach (the Section Master), there with his hands the week before "and did some work for me in the pit"; he said he did not remember seeing them there the day before (folio 58). Appellant's counsel asked this witness "Q. Don't you know that Mr. Leach was working up the road a mile or two? A. No, sir; I don't know that. Q. You just know they had not worked there that week? A. Yes, sir."

Witness said the tools were about as far from the track as the wall on the opposite side of the court house, fifty or sixty feet and that the crowbar had the Southern's name indented and he saw in the ties the dent where the spikes had been pulled and appellant's counsel asked (folio 65), "It was not a matter of fixing the track and leaving them out? A. No, sir; they were pulled."

On re-direct examination this witness said the spikes and about three ties had been pulled and answered the question.

"Q. They were not pulled on both sides?

"A. I think the first one was pulled on both sides, and some were in there on the outside. It pulled on both sides, and some were in there on the outside. It pulled them on the inside where it could go in," the "it" meaning the rail evidently. Then in answer to the question:

"Q. How many of the spikes did you see there?"

The witness said:

"A. I didn't count them, but it looked like three or four." He never found the tools until about two or three o'clock in the afternoon (folios 70-71), and he always knocked off his work about two o'clock. He said the crowbar was about all he wanted to tote to a little office of his and he further said the scene of the wreck was between the crossing and Beech Island Station about a mile and a half or two miles and was right at his gravel pit. He said he could see where two tracks went up the bank (folio 76), but did not follow them. The railroad men did.

Then on re-direct examination (it will be recalled this witness was summoned by the railroad), the witness said:

"Q. You said there were two tracks?

"A. Yes.

"Q. Had many people been there that morning?

"A. Yes, sir; a big crowd.

"Q. They had been walking around and looking?

"A. Yes, sir."

This testimony shows that the bolts were pulled neatly and that the first one was pulled on both sides (speaking of the tie now) and some were in there on the outside. "It pulled them on the inside where it could go in." He did not count the spikes but it looked like three or four. Hence, the testimony shows that all the spikes, three or four that had been removed and not put back, were lying on the cross-ties as any section master would draw them and the ones on the outside, except as to one tie, were intact in the ties; that there was a dent in the end of the rail that the flange of a wheel would strike when a train was going out of Augusta and it appears from the dent that the flange actually did strike to the center of the end of the rail; and the angle plates on the Augusta end were on.

His testimony refers to the tools that were found off the right of way belonging to the Southern Railroad that had been brought four or five miles, the crowbar being as much

as Mr. Dobson cared to tote; and notwithstanding large crowds had been there that morning walking around looking, between two and three o'clock in the afternoon, just about 12 hours after the wreck, tracks were plainly traced by Mr. Dobson and the railroad men from the scene of the wreck to where the tools were found.

C. M. Randall (folios 78-95), says: That he was not at the wreck; that he knows where the gravel pit is between the crossing and Beech Island station and that the gravel pit is in sight of the other crossing (folio 80).

That he had a hay field between the railroad and the river when this wreck occurred, and that he remembered when he heard of the wreck that what he had seen the afternoon before was fixed on his mind, namely, some section hands working up the railroad, about four or five o'clock, working like fixing a rail; that he never paid much attention to them at the time, and had seen them so much, having been crossing often for about a year (folios 82-84).

Mr. Randall was positive that he saw the men working the day before (folio 89), about the Beech Island crossing and between there and the sand pit. He was in a wagon.

At this point a motion was made for a nonsuit on the ground that there had been insufficient evidence of actionable negligence to warrant submission of the issues to the jury. The presiding Judge said there was enough to go to the jury; but he supposed a motion would be made to direct a verdict and that he would pass the whole thing.

DEFENSE TESTIMONY

Mr. Leach (folio 104) was the section man in charge of the road where the wreck occurred and flatly contradicting Randall, he said, when asked if his hands had worked at the scene of the wreck at any time before: "No, sir; it had been sixty days." It will be noted that Mr. Dobson had testified that they had worked there the week before; but Leach even contradicts him.

Speaking of the time and manner of finding the tools, Leach said (folio 119): "A. Mr. Dobson called my attention to it. He found them in my sight. He walked off and tracked the tracks." It will be noted that either Dobson or Leach is mistaken about the time when the tools were found, for while Dobson said it was three P. M. the same day of the wreck, Leach said it was the second day afterwards (folio 141). At any rate it was certainly interesting to a jury to know how tracks could be made from a wreck to tools even twelve hours after the wreck, when large crowds had attended the wreck, to find tools hid away near the scene of the wreck, and when those tools had to be brought four or five miles. The jury simply did not accept the theory suggested to them that the wreck was caused by some unknown person, who had no motive whatever.

Mr. Leach undertook to contradict Randall, who was very irritating to the defendant's witnesses when he said he saw the section hands working in the vicinity of the wreck, working on the rails; in his effort to contradict Randall, Leach said that Randall would have to have crooked eyes "as there is a stiff curve in there," if he could see from what we call the Beech Island crossing, as far down as where the wreck occurred; and Leach emphasized his statement by saying (folio 121), . . . "it is a very abrupt curve in there. Q. How far is it? A. A mile and a half or three-quarters from the crossing." This did not correspond with Mr. Dobson's testimony, who was summoned by both sides, and he testified before Mr. Randall did, for Mr. Dobson had testified (folio 59): "I think it had been retied and it was a plumb straight track."

It is true that Mr. Dobson was recalled (folio 646), in an effort to wipe out the testimony of the section man who said the tools were found the second day of the wreck, by reasserting Dobson's recollection that they were found the afternoon of the day of the wreck. In an effort to demolish Randall's testimony that he saw section hands working in the vicinity of the wreck, Dobson also said that you could

not see "any ways near" the point of the wreck, on account of a "bluff and curve." But on cross examination the witness said there was nothing to obstruct the view down the track for about a mile from Beech Island back to the wreck. After all it seems the witness had accurately described the track when he first testified that it was a "plumb straight" track where the wreck occurred, and was evidently at a point where the vision was not involved by a curve. At least the jury were justified in accepting Randall's statement and Dobson's statement as first made, that it was a "plumb straight" track. For Mr. Davies, who came to help the railroad with his testimony, and who has a track connecting with the C. & W. C. track, after saying it was impossible to see the point where the wreck was, modified his statement by saying that you could not see in a quarter of a mile of it (folio 217). Asked then pointedly "Then to see anybody, he would have to be how far from the wreck? A. Over a half mile *or further,*" which was a very indefinite statement. But the section man and his witness said that he was working in an entirely different section of the road to that between Beech Island crossing and the wreck, and it was peculiarly within the province of the railroad company to know where they were working and to know when they worked there last and it was their duty to have done so and to have truly testified where they were working. In this conflict the jury had the right to accept the testimony of Randall that he saw them working in the vicinity of the wreck, fixing the rail. And the fact that Randall's testimony was true is corroborated by the inspector's testimony which will later be referred to, who said that the work Leach was doing the day before the wreck (the only question is one of locating him), was "lining and gauging" (folio 189); hence, when Randall, the first witness to say what Leach was doing, said that Leach appeared to be "working like fixing a rail" Randall certainly was describing what the supervisor of the road said he was actually doing, namely, "lining and gauging."

Leach said he had been over the road a dozen times but

did not remember whether he sent a track walker the day or the day before or when to inspect the track. He said some of the ties were new and some were old (folio 156) and that neither the old nor the new had any marks of bars on them before the wreck. The jury would not accept this theory, because they knew a man who was "lining and gauging" must have of necessity pulled spikes from the ties and changed the width between the two rails and the pulling of spikes necessarily caused the dents on the ties; and if while working on the rail at the point of the wreck on the late afternoon of the day before, Leach and his hands neglected to put back the spikes taken from two or three ties and failed to bolt one end of the angle irons, **it was perfectly reasonable that the trains passing over this weak place would jar the rail out of position until the flange of the wheel struck it and threw the train from the rail,** for Dobson said there was a dent in the rail to the center and Davies said the dent was slightly to the left of the center, using this language "At what point did it hit it? A. It did not hit it plumb. Q. Which side did it hit it on? A. On the left side." It can be seen that a train wrecker would not have so slightly thrown the rail out of alignment as to make it so that the flange would hit it slightly to the left of the center; but **if the section master failed to put back a few spikes and two or three bolts, the trains constantly running over the road would throw the track out of alignment so that one of the flanges would strike it, and this is what was done in this case, for the engine had practically passed over the joint that was out of alignment, and the flange that struck the end of the rail dented it slightly to the left of the center of the rail; and the jury could infer from the neatness with which the bolts and spikes were removed and piled that they were removed and piled by section men and that section men on leaving the scene of the wreck, where they had been working, simply neglected to put**

these two or three spikes back in and neglected to bolt the angle irons on the Ellenton end of the rail. Peculiarly a question of circumstantial evidence for the jury.

Jack Stevens was a member of the section master's crew and he testified "The day just before the wreck, as near as I can come at it, we were between the six and seven mile posts working." "Q. How far is that away from where the wreck occurred? A. About two miles is as close as I can come to it. Q. You and your crew had not done any work down where this wreck occurred at that time? A. No, sir. Q. You know about how long it had been since you had done any work there? A. No, sir" (folios 165-167). On cross-examination this witness said "Q. Who told you that you were at the six or seven mile post the day before the wreck happened? A. We stopped that morning I remember to get a push car and go there. Q. You talked to somebody about the case this morning, didn't you? A. No, sir. Q. Yesterday? A. No, sir; I am just trying to think it up. Q. This is the first time you testified about this case, I believe? A. Yes, sir. Q. Then you have talked with somebody about this case since 1921? A. Not as I know of (folios 173-174)."

It will be noted that another witness working with the crew puts the section master's operations the day before two miles away and has no recollection even when work was done in the vicinity of the wreck, although Mr. Dobson says they were there the week before.

T. H. Dean, road master, says that the section men were working the day before the wreck, "lining and gauging," between the six and seven mile posts, and that they had not been working down where the wreck occurred (folio 188); and he describes the pulling of the spikes as being pulled out along the whole rail (folio 194); which is a contradiction of Davies and Dobson, who described the pulling of two or three ties only, and then on both sides of the rail as to one tie only; and if the whole rail had been pulled and the rail put out of position no part of the engine would have crossed over it. And again this same witness said (folio

201), that the fastenings had all been pulled and that a rail had been taken out (folios 200-201).

Davies, a defense witness, says (folio 212) "Only two or three of the bolts had been withdrawn, and that (folio 244) the flange of the wheel struck the end of the rail on the left side of the center of the rail that the engine was approaching and that the rail varied from one to three inches out of alignment (folio 242) and that it was only four or five feet down the rail to where the spikes were in the ties (folio 240); and that the train jumped the track because it hit the end of the rail pointing towards Augusta and that the rail pointing off from Augusta was pushed in (folio 232); but **the jury had the right to say that the flange striking the end of the rail to the left of the center or even at the center showed that the rail was slightly out of alignment, which would naturally come about by reason of the bolts and spikes being left out on the afternoon before and the trains jarring that joint out of alignment, for witness Davies himself says (folio 244) "it did not hit it plumb." "Q. Which side did it hit it on? A. On the left side." The jury deduced from this testimony that if the flange hit the rail to the left of the center, knowing the width of a rail, it would be impossible to say that the track was out of alignment enough to call it from one to three inches and that it was not enough out of alignment to say that a train wrecker would leave it that way believing he would wreck a train; but that the crew had left it while "lining and gauging" the afternoon before without putting back all the bolts in the angle irons and without putting all the spikes in two or three of the ties.** Mr. Davies' version was as follows: "What caused it? (folios 228-229). Several spikes were drawn up and the rail was pushed in and then driven down in a new place. Q. How many of them? A. Not as many as should have been to hold a rail accurately. Q. How many were there? A. I know there was one. Q. How many more? A. I don't know how many

there were, but I know there was one. Q. How many more? A. There may have been two or three. I know there was one because I saw it. Q. How far was it driven in from the place where it was pulled out before? A. I would say an inch or so. Q. The track was pulled in an inch or so? A. Yes, sir. Q. And the spike was driven down to hold it? A. Yes, sir. Q. Where was the hammer? A. I don't know. I did not see anyone drive it. Q. Did you see one or more spikes? A. I saw one I am certain."

Mr. Davies may have been ever so honest in his desire to show that someone had thrown the rail out of alignment purposely to wreck a train; but **this testimony certainly shows that the spikes had been drawn or at least one, and had been driven in again, and that it was not out of alignment one or more inches, for the flange of the wheel struck the track to the left of the center thereof,** and if Mr. Leach was "lining and gauging" as was testified to by the road master and if Randall properly located him, **it is more reasonable to believe that in "lining and gauging," which necessarily required the drawing of spikes and the replacing of rails, the section master forgot some spikes and forgot some bolts and that the rail got far enough out of alignment to strike it to the left of the center thereof** (folio 244). The tools found are completely discredited because they were not found until the day after the wreck after crowds had walked about over the grounds.

A number of witnesses were put up by the defense to show that numerous trains had passed over the defective track, on which to base the argument that the defect was made after the last train preceding the one wrecked, nearly all of the trains passing going towards Augusta. Not only would it be natural for trains going into Augusta to press their way through the track that was too narrow without the flange striking anything to make it jump the track; but it would be perfectly natural for it to do so. We are mindful of the testimony that a train had passed going out of

Augusta and in the same direction as the wrecked train was going; but **as was testified by Mr. Johnson (folio 692) "It would be possible for a whole train to pass over it before it got out for a train to hit it."** Mr. Johnson was a defendant's witness, who qualified as an expert. He said (folio 691): "Q. Have you not seen many wrecks where the engine and car get over it? A. Yes, sir; and it is possible that the train and car or engine and car went over this place because it traveled 190 feet. The engine frame is rigid and that holds it up. Q. As long as it stays in place it will set there, but if in the shaping of the road that rail works out a little into the middle of the road where a flange of the wheel hits it to the left of the center, that will cause a derailment? A. Yes, sir; a track out of alignment will cause a derailment."

This same witness said (folio 693) that the force of the impact would carry the rail forward.

It will be noted that after dinner (folio 696) this same witness was recalled to the stand and in an effort to explain his testimony, said it would not be possible for a whole train to have crossed a rail exactly in alignment, but loosened, as was evidenced by the examination made by witness. This testimony seems in a measure to contradict what the witness had said before dinner. When this witness was on the stand again (folio 698) he said there was a slight abrasion on the rail and that: "It might have been a wheel or something about the wrecked part of the cars," that caused the abrasion; and the witness then said that the rail was so badly bent that it was not "replaced" in the track, which contradicted the testimony given by the conductor. The Court will bear in mind the testimony the witness, Johnson, was giving after dinner was in an effort to explain what he had said before dinner, to wit (folio 692): Q. "It would be possible for a whole train to pass over it before it got out for *a train* to hit it? A. Yes, sir." We submit that the jury accepted this view of it; to wit that the previous train

going over this same track, going in the same direction, passed over the joint before the rail worked out, and that the train wrecked (a part of which had passed over the joint) struck the end of the worked-out rail, slightly to the left of the center thereof, with the flange on one of the wheels and **it will be remembered that the witness, Davies, said that he saw at least one spike that had been drawn and re-driven, which would support the view that it would be perfectly easy for the rail to stay in alignment for even more than one train to pass over it before the vibration of the passing train jarred the rail out of alignment; and the same witness, Mr. Davies, said that there were only two or three spikes out of the rail.**

It will be noted that other witnesses put up by the defense denied that the rail causing the trouble had been drawn in and that the spikes had been drawn and driven down in another place, and some of them denied that the spikes were drawn as section hands would draw them; but a **reading of the testimony will show that the spikes were drawn with the same instruments, according to both plaintiff and defense theories, that a section hand would draw them with; that the wrench and crowbar would be used by either a train wrecker or a section hand and a justifiable inference that the jury could draw from the testimony was that the "lining and gauging" that the section foreman was doing the day before was where the defective rail was; and they rejected the idea that the section house of the Southern Railway had been entered by a train wrecker, several miles away, by boring holes in the side of the wall until the boards could be taken out and the crowbar and the wrench be taken several miles to the particular point where the wreck was, for the purpose of wrecking the train, without a motive; and the idea that the tracks could be discovered leading away from the place of the wreck in the afternoon where numerous ones had**

walked all over the ground the morning before, was rejected by the jury and it is respectfully submitted that the facts in the case warranted the jury in doing so.

Some of the witnesses said that the spikes were taken up all the way down the rail and some of them said that two rails had been tampered with and some of them said that the rail had been set out six or eight inches. It is but common sense that an engineer would have observed a rail taken clean out and would have made some effort to stop his train before plunging into a place of this character; whereas the evidence shows that a part of the train passed over the defective joint before the flange on one of the wheels struck the end of the rail and derailed the train.

The case was one, turning purely upon circumstantial evidence, and the circumstances pointed so strongly to the theory of the plaintiff that the jury found their verdict upon the evidence and it was peculiarly a question for a jury.

Considerable effort was made to dispose of the witness Randall who was going to his hay field. The principal idea was to show that he could not see to the point where he said the section man was working at the track. Dobson was recalled to say (folio 648) "One crossing at Beech Island could not see the point of the wreck or near it?" His answer was; "No, sir; they could not see any ways near it. Q. Why? A. On account of a bluff and curve." On cross examination this witness said: "Q. For about a mile from Beech Island back to the wreck is a straight track? A. Yes, sir; it looks to be nearly a mile. Q. There is nothing to obstruct the view down the track? A. No, sir; it would be open for practically a mile" (folio 652).

In the testimony of the witness Craddock (folio 493) the record shows: "Q. Can you tell the distance from the point of the wreck to Beech Island station by your mile post or anything else on there? A. Yes, sir; I can give it to you accurately. Q. What is it? A. Approximately one and three-tenths miles. Q. From the place of the wreck to Beech

Island station as shown on here? A. Yes, sir. Q. As we go on I see a curve in here, what is that? A. A five degree curve to the left. Q. Proceeding East? A. Yes, sir" (folio 495).

Although this witness said (folio 499) that it was a physical impossibility to see to the point of the wreck with the five degree curve at the point indicated, yet, on cross examination (folio 506) he said "Q. How far is that bank dug out from the railroad track? A. In some places I guess it is 300 feet, but you cannot see the gravel pit from Beech Island station. Q. I am not talking about that—a man can see about a mile from Beech Island down this way? A. Yes, sir. Q. And none of this part of the road is between the six and seven mile post? A. Not a bit. Q. Because that is on the other side towards Ellenton? A. Yes, sir."

This testimony is significant because it shows that you can see a mile back towards the wreck; that is within three-tenths of a mile of the very point where the wreck occurred, considering the case from the defense's point of view; yet the section man said that he was between the six and seven mile post on the day before the wreck and that place is on the other side towards Ellenton. Granting for the sake of argument that Randall's claim is incorrect (though this was question for the jury), yet according to the defense's own testimony one could see from Beech Island to within three-tenths of a mile of where the wreck was, and if Randall could see the section man within three-tenths of a mile of where the wreck was, and if he was fixing the track (lining and gauging as testified to by the defense's witnesses), he was certainly where he said he was not working, and he was certainly doing work that he could travel three-tenths of a mile to do in one afternoon; because lining and gauging is nothing more than relocating rails to make them properly lined and gauged; indeed, such work may not be necessary within a space of three-tenths of a mile.

The testimony clearly shows that the Southern Railway tools were not found until twelve or thirty-six hours after

the wreck, for the section master said (folio 140) "Oh, that was a day or two, afterwards," when referring to the finding of the tools, and when found, they were found to be of a larger size than the tools used to remove bolts of the size used by the C. & W. C. (folios 66, 635), and yet there is no evidence in this case to show that there was a tendency to round the corners of the nuts taken off the bolts, as would happen if a wrench should be used larger than the head of the bolt, notwithstanding the fact that the section master said (folio 144), in referring to the nuts and bolts ". . . . but the morning of the wreck they were laying at the joint on the inside of the rail there"; and there was no effort made on the part of the defendant to show that these nuts and tools were removed by a wrench too large to remove them neatly.

And there was nothing found with these tools that could drive spikes, yet two of the witnesses, Davies and Dobson, said that spikes had been drawn and re-driven; and not only did the supervisor of construction say (folio 189) that the section master was on the day before the wreck lining and gauging; but the section hand said (folio 180), in referring to the car the day before the wreck, "We were working and using it to haul ties."

"Q. You left that car out there?

"A. When we had a lot of ties to pull, we did."

And the section master, although he said ties were generally burned, on cross-examination admitted that he had picked out good ties and carried them to another point and admitted that such re-used ties were in the vicinity of the wreck (folio 157).

"Q. When you were working the track, didn't you take the spikes out of an old tie?

A. When you go to pull it out.

Q. And you put the old tie back in again?

A. No, sir; not those.

Q. I asked if you had ever done that?

"A. Yes, sir; I have picked out the good ties and carried them to another point.

"Q. You make a positive statement to these gentlemen that not a single one of the ties in the neighborhood of the wreck had a heel mark on it before the wreck?

"A. No, sir.

"Q. And every tie in one hundred yards of there had no heel mark on it?

"A. No, sir; I said at the wreck."

It will be seen from this line of testimony that the section master was simply denying that the tie right at the wreck had ever been removed, while he admitted that he had re-used ties at other points.

While the expressions are used by the witnesses throughout the case that the rail had been "tampered with" or that the spikes had been "pulled" etc., yet respondent respectfully submits that the testimony shows clearly that the instruments used to pull spikes and take nuts off the bolts are made by the same machinery, though different sizes, and when boiled down to its final analysis, whether removed by a wrecker or by a section hand, the same instruments would be used to perform the task; but the section master denied that he was in that section the day before and said he was two miles away in the opposite direction from the Beech Island crossing and that he had not worked up there in sixty days and Mr. Dobson said he had worked up there the week before; and, in re-aligning and gauging, he would perform the identical service of taking up and driving down spikes and re-setting rails and would have a hammer with him; while amongst the tools found there was no hammer nor other instrument to drive with and plaintiff's intestate had died in the service of his master and the death resulted from a rail that was out of alignment, and in this case, as in many others of its kind, circumstantial evidence must be resorted to to find the cause of the derailment.

A jury certainly could not say they would pass up the duty of solving the evidence. They did not say that it was

the act of a criminal; for they evidently did not accept the theory that tracks were visible from the wreck to where these tools were found, even in the afternoon of the day of the wreck, after so many people had passed over the grounds during the day. They had the right to reject the argument that some criminal would carry the tools to the particular place where the train was wrecked, and then carry them away and hide them, for no reason whatever. The jury had the right to believe that the tools were put there after the wreck, for where was the hammer to drive with? The jury had the right to infer that the section master, re-aligning and gauging, had been in the vicinity of the wreck the afternoon before and not two miles away as he said he was and that he actually re-aligned and gauged the identical spot where the derailment occurred, because it had all the ear marks of a rail having been re-set, and the jury had the right to believe that one or two trains would have passed over it from Augusta and that there would be no difficulty in many trains passing over the place going to Augusta and that the vibration caused the rail to draw in slightly so that the flange of the wheel would hit slightly to the left of the center thereof, which showed that it was only slightly out of alignment when it was struck, and that it was due to the negligence in properly spiking and bolting the rail the afternoon before, when the section crew was there re-aligning and gauging; the spikes and nuts found were neatly drawn and neatly piled, as a section master would do; and not as a train wrecker would do with a wrench too large to fit nuts properly, and who was taking off nuts and drawing spikes in the dead hours of the night.

APPLICATION OF LAW POINTS IN CONSIDERATION OF TESTIMONY

The rule prevailing in State practice, reiterated in *Dutton v. R. Co.*, 104 S. C., 16, 30 (judgment affirmed in memo-

randum opinion, 245 U. S., 637) is that the evidence required to carry the case to the jury is **"such evidence as is sufficient to warrant a reasonable jury in rendering a verdict upon it."**

And, in this connection, the Court further said:

"We have frequently held that a non-suit should be granted or the verdict directed, unless the evidence is sufficient to warrant a reasonable jury in basing a verdict upon it, and we have held, in cases too numerous to mention, that when the evidence is susceptible of only one reasonable inference, the Court must declare what that inference is, as matter of law."

It is clear from the foregoing that the rule of State practice governing the submission of cases to the jury is not at all different from the Federal practice rule declared in *Gunning v. Cooley*, 281 U. S., 90, 94 (cited in petitioner's brief), to the effect "that in every case, before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed."

It is clear also from the opinion of the State Supreme Court in the instant case that, in sustaining the judgment found against defendant, effect was given to the foregoing consideration; for, in the majority opinion, it is pointed out that the testimony concerning the conditions found to exist at the place of the accident justify the inference "that the rail in question was left unbolted and unspiked by the section-hands and not caused and occasioned by some outside person as contended by the defendant." In stating this conclusion, the opinion further comments:

"It is hard to conceive of a person bent on mischief taking time enough to arrange the bolts and spikes in the order in which they were found and to have done the other acts in the manner described by witnesses. On the other hand it may be reasonably inferred from

all of the facts and circumstances that the section hands left the work at that place unfinished the evening before the wreck occurred. According to our view this was an issue for the jury."

In *Gunning v. Cooley, supra* (cited and strongly relied upon in petitioner's brief) judgment for plaintiff was sustained on circumstantial evidence, notwithstanding direct evidence given by defendant in his effort to exculpate himself from the charge made against him; and, more directly applicable to such conclusion than the statement of general principles quoted in petitioner's brief, we find three other propositions of law (which are just as pertinent to the case at bar) stated (at page 94) as follows:

"Issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury.

"In determining a motion of either party for a peremptory instruction, the Court assumes that the evidence for the opposing party proves all that it reasonably may be found to establish, and that from such facts there should be drawn in favor of the latter all the inferences that fairly are deducible from them.

"Where uncertainty as to the existence of negligence arises from a conflict in the testimony or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them, the question is not one of law but of fact to be settled by the jury."

In our discussion and analysis of the testimony, in argument before the State Supreme Court as well as in the argument which is made here, we recognize the rule stated in *Chesapeake & O. R. Co. v. Martin*, 283 U. S., 209, 214, that the Court "is not at liberty to disregard the testimony of a witness on the ground that he is an employee of the defendant, in the absence of conflicting proof or of circumstances justifying countervailing inferences or suggesting doubt as to the truth of his statement, unless the evi-

dence be of such a nature as fairly to be open to challenge as suspicious or inherently improbable." In commenting upon the testimony given by the employee of defendant, the Court (283 U. S., 215) pointed out that it was reasonable upon its face and in accordance with probability; that it was wholly unchallenged by other evidence or circumstances; and that it was so completely corroborated by the undisputed facts as to put it beyond the reach of a fair doubt. In this connection (at page 216), it is said:

"A reading of it (the testimony of the employee) discloses no lack of candor on his part. It was not shaken by cross-examination; indeed, upon this point, there was no cross-examination. Its accuracy was not controverted by proof or circumstance, directly or inferentially; and it is difficult to see why, if inaccurate, it readily could not have been shown to be so. The witness was not impeached; and there was nothing in the record which reflects unfavorably upon his credibility."

The instant case is distinguishable because of circumstances in the case, justifying the inference by the jury, that section hands, working on the track, had failed to properly spike and bolt one of the rails, and that the work improperly done was the cause of the derailment. There is the testimony of Randall, a witness not interested in the cause, that section hands were working "like fixing a rail" near the place of the derailment on the afternoon before (folios 83-84 and 89-90). There is the testimony of Leach, section foreman, who must be regarded as an interested witness, that the section crew had a handcar which was used in their work (folio 177). There is the testimony of Dean, road master, who must also be regarded as an interested witness, that the track hands were "lining and gauging," although he says that they were doing this work between the six and seven mile post while the wreck occurred between the four and five mile post. It was clearly a matter for the jury to pass upon and

weigh the probability of such testimony. It was entirely reasonable for the jury to infer that the defect in the track grew out of the re-alignment of a rail that was not properly gauged or fastened to the ties, and the inference was justified that the work had been left incomplete when the track hands quit work for the day. The inference was also justified that the western end of the rail (the end pointing towards Augusta) was so drawn in in the resetting of the same, that because of certain spikes left out, the motion of the train caused the re-set end of the rail to draw in to the center of the road enough for a flange on the wheel to hit it, causing the derailment.

The fact that a number of trains passed over the rail, going to Augusta, is an inconclusive circumstance, because the end of the rail did not set in to strike trains going in this direction; the fact that a train or two had passed over the rail, going in the same direction as the wrecked train is explained by the testimony of Johnson, qualified as an expert witness for defendant, who, under cross-examination, testified that it is possible that the engine and car went over this place before the rail had worked out of alignment because it traveled 190 ft. (folios 690, 691).

"Q. It would be possible for a whole train to pass over it before it got out for a train to hit it?

"A. Yes, sir."

The facts are in the evidence to sustain the inference that the rail was worked out of alignment by the strain put upon it by the passing train; and while no one saw the occurrence, yet the mute testimony is conclusive; for if the rail had been lying 6 or 8 inches off, it is probable that the engineer would have seen it; and certainly the flange of the wheel would not have struck it so as to make the dent in the rail described by Dobson (folio 45) and Davies (folio 225); and the train would in all probability have been derailed instantly; but it is an uncontroverted fact of the case

that the engine and a part of the train passed over the rail before it had worked far enough out of alignment to cause the derailment.

In the case of *Sanders v. C. & W. C. R. Co.*, 147 S. C., 487, 493, it was said: "Some act of negligence as alleged must be proven, but this negligence may be shown by a number of facts and circumstances, which, taken together, establish the act of negligence charged."

In the case of *Dantzler v. Cox*, 75 S. C., 334, 339, it was said: "While there was no direct and positive testimony sustaining the defenses set up in the answer, still there were facts and circumstances, from which the jury might properly have drawn the inference, in favor of said allegations. The rule is thus stated in *Railroad v. Partlow*, 14 Rich., 237: 'It may be that no one of the facts would of itself warrant the inference and yet, when taken together, they may produce belief, which is the object of all evidence.' In 1 Greenl. Ev., Sec. 51a, it is said: 'It is not necessary that the evidence should bear directly upon the issue. It is admissible if it tends to prove the issue or constitutes a link in the chain of proof; although alone it might not justify a verdict in accordance with it. All the circumstances mentioned in this ground may be regarded as links in the chain of proof, from which the jury might deduce the inference of the defendant's privity and direction in the acts of trespass. This is usually the case where an issue depends on circumstantial evidence. Among the circumstances was the fact that, having the opportunity to take the stand and exculpate himself, the defendant declined to do so.'"

It will be seen from an examination of the record that defendant's witnesses contradicted themselves in trying to explain the condition of the rails, bolts, angle irons, and ties. They contradicted themselves as to when and where the section hands had been working before the wreck, as will be seen by reading the testimony of Leach and Dobson. (Dobson was summoned by defendant, as well as by plaintiff, and was recalled and placed on the stand as defendant's

witness). They contradicted themselves as to whether the rail was pushed out or not, as to whether it was straight or bent, as to whether it was dented or not. Their testimony concerning the tools (which, under their theory, were used in removing the bolts and spikes) also presents many elements of improbability. The theory they present is that the train wrecker broke into the Southern Railway tool house several miles away; took out a heavy wrench and heavier clawbar; carried the wrench and clawbar for miles; used them to remove the bolts from the angle plates and to pull spikes from the cross ties; then threw the tools into a near-by gravel pit—where they were found the afternoon of the day of the wreck or a day or two after (the afternoon, as Dobson said [folios 46–48 and folio 645]; on the second day after the wreck [folios 141, 159], as Leach, the section foreman said), although many people had trodden over the ground before the discovery of the tracks leading to the tools (folios 61, 62 and folio 77). The wrench, as Dobson testified, "was larger than the bolts" (folio 66); and Gannt, section foreman of the Southern Railway, when asked whether the wrench would fit the bolts loosely or snugly, said, **"It would fit but not snugly. It would cut the corners some"** (folio 635).

The record will, however, be searched in vain for any evidence to show that the nuts which had been taken off showed any damage on their corners from the use of a wrench which was too large. The wrench, although taken later to the Augusta office of the C. & W. C. R. Co. (folio 620), was not produced at the trial. As to the nuts and bolts, Leach, the section foreman of the C. & W. C. R. Co., testified that the nuts and bolts were not there two days afterwards and that "they might have been buried there somewhere, as we had made repairs. But the morning of the wreck they were laying at the joint on the inside of the rail there" (folio 144). At any event the bolts and nuts were not produced at the trial although they had admittedly been in defendant's possession and although it must have been

obvious that a test (which could easily have been made by the jury) would afford demonstrative evidence of the strongest kind to show whether the nuts had, in fact, been taken off by the loosely-fitting Southern Railway wrench which, as testified by Gannt, "would cut the corners some."

As was stated in *Anderson v. Hampton & Branchville Railroad Co.*, 134 S. C., 185: "And not only should questions of fact be submitted to the jury when they are in dispute; but also the matter is proper for the jury to pass upon, when the question is as to inferences to be drawn from such facts, after the facts have been determined." The question was solely one of whether or not there was sufficient evidence to go to the jury.

A case closely in point is *Southern Railway Company (Carolina Division), v. Bennett, Admr.*, 233 U. S., 80, 85, affirming 98 S. C., 42, where the defendant was killed by the falling of his engine through a burning trestle bridge, and there was evidence tending to show that the trestle was more or less rotten and that the fire was caused by the dropping of coals from an earlier train. An instruction was given by the trial Court to the effect that, if a servant is injured through defective instrumentalities, it is *prima facie* evidence of the master's negligence and that the master "assumes the burden" of showing that he exercised due care in furnishing them. Commenting on this instruction, the opinion, delivered by Mr. Justice Holmes, said:

"Of course the burden of proving negligence in a strict sense is on the plaintiff throughout, as was recognized and stated later in the charge. The phrase picked out for criticism did not controvert that proposition but merely expressed in an untechnical way that **if the death was due to a defective instrumentality and no explanation was given, the plaintiff had sustained the burden.** . . . The Judge did not say that the fall of the engine was enough, but that proof of a defect in appliances which the company was bound to use care to keep in order and which usually would be in order if due care was taken, was *prima*

facie evidence of neglect. **The instruction concerned conditions . . . about which the company had better means of information than the plaintiff, and concerning which it offered precise evidence, which, however, did not satisfy the jury."**

In *San Juan Light Co. v. Requena,* 224 U. S., 90, 98, it was held that the instruction given to the jury on the presumption of negligence arising from the fact of the occurrence which "devolved" on defendant electric company "to show that the surplus and dangerous current that came over the wires did not occur from any negligent act on its part"—when read in the light of what preceded and followed it and of the case before the jury—"rightly declared and applied the doctrine of *res ipsa loquitur,* which is, when a thing which causes injury, without fault of the injured person, is shown to be under the exclusive control of the defendant, and the injury is such as in the ordinary course of things does not occur if the one having such control uses proper care, it affords reasonable evidence, in the absence of an explanation, that the injury arose from the defendant's want of care." In stating that there was no error in the application of the doctrine in the particular instance, the opinion pointed out:

"The deceased was without fault. . . . Had its (the defendant's), wires and converters been in proper condition, the excessive and dangerous current would not have been communicated to its secondary wire and the injury would not have occurred. These wires and converters were exclusively under its control, and it was charged with the continuing duty of taking reasonable precautions, proportioned to the danger to be apprehended, to maintain them in proper condition. In the ordinary or usual course of things, the injury would not have occurred had that duty been performed. Not only did the injury occur, but immediately thereafter both converters were found to be out of order. . . . **These circumstances pointed so persuasively to negligence on its part that it was not too much to**

call upon it for an explanation. Of course, if the cause of the injury was one which it could not have foreseen and guarded against, it was not culpable, but in the absence of that or some other explanation there was enough to justify the jury in finding it culpable."

In *Spokane & Inland R. Co. v. Campbell,* 241 U. S., 497, 505, an action was brought under the Federal Employers' Liability Act by an engineer of an interstate electric road, for injuries resulting from a collision. Defective air brake equipment was alleged as causing the accident. The evidence was circumstantial. Plaintiff's testimony was that when he applied the emergency, 600 feet or more from the place where the collision occurred, the brakes took hold and then leaked off so as to release the brakes. There was also testimony that the train could have been stopped inside of 300 feet, if the brakes had been in proper order. Against this testimony was the testimony of defendant that the air brakes had been inspected and found in perfect order immediately before the train was taken out on the trip. It was held that the case was properly submitted to the jury; and judgment for plaintiff was affirmed. In discussing the inferences to be drawn from the testimony, Mr. Justice Pitney commented: **"The air brake equipment was wrecked in the collision so that there was no explanation of the cause of its failure to operate properly; but it was a reasonable inference that there was some defect or want of repair in the valves or packing."**

In *Travelers' Insurance Co. v. McConkey,* 127 U. S., 661, the question arose, under the provisions in an insurance policy, whether the death of the deceased was the result of suicide or was caused from injuries (or an injury) effected through external, violent and accidental means within the intended meaning of the contract and conditions expressed in the policy. In considering this question, Mr. Justice Harlan, delivering the opinion of the Court, said:

"The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the

condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified."

In *Sweeney v. Erving*, 228 U. S., 233, the Court held that the rule of *res ipsa loquitur* does not have the effect of shifting the burden of proof, but that there is a class of cases where the circumstances of the occurrence that have caused the injury are of a character to give ground for a reasonable inference that if due care had been employed by the parties charged with care in the premises, the thing that happened amiss would not have happened. In this connection (at page 240), it was said:

"In our opinion, *res ipsa loquitur* means that **the facts of the occurrence warrant the inference of negligence,** not that they compel such an inference; **that they furnish circumstantial evidence of negligence where direct evidence of it may be lacking,** but it is evidence to be weighed, not necessarily to be accepted as sufficient; **that they call for explanation or rebuttal,** not necessarily that they require it; **that they make a case to be decided by the jury,** not that they forestall the verdict. *Res ipsa loquitur*, where it applies, does not convert the defendant's general issue into an affirmative defense. **When all the evidence is in, the question for the jury is, whether the preponderance is with the plaintiff."**

Two of the cases above referred to—*Southern R. Co. (Carolina Division), v. Bennett;* and *Spokane, etc., R. Co. v. Campbell*—were master and servant cases arising under the Federal Employers' Liability Act. *Sweeney v. Erving* (not a master and servant case) cites with approval cases from the North Carolina Supreme Court; and, in the decisions of that Court, we find a long line of collision and derailment cases where the presumption of negligence arising

from the occurrence is recognized as a substantial factor of proof to make out plaintiff's case.

In *Wright v. R. Co.*, 127 N. C., 225, 229, where plaintiff's intestate, a brakeman in the employ of defendant company, was killed in a railroad wreck occasioned by derailment, it was said:

"The Court has held in *Kinney v. Railroad Co.*, 122 N. C., at page 964, where the plaintiff was an engineer injured in a collision: **'If the doctrine of res ipsa loquitur ever applies, it should certainly do so in such a case.'** In a still later case (*Marcom v. Railroad Co.*, 126 N. C., 200), also by a unanimous Court, it is held: 'Where the derailment of the engine resulted in the death of the intestate, a fireman in the employ of the defendant company, a *prima facie* case of negligence is to be inferred, and the burden is thrown upon the defendant to disprove negligence on its part.' **It is true that a common carrier is not an insurer of the safety of an employe, neither does it insure the safety of a passenger; but when there is a collision, or a derailment, and in like cases, the presumption of negligence arises. It is a rule of evidence, which, in no wise, springs out of the contract for carriage, but which arises from the fact that such things do not ordinarily happen unless there is negligence on the part of the carrier, and therefore it arises equally, whether the injured party is a passenger, or an employe."**

In *Winslow v. Norfolk Hardwood Co.*, 147 N. C., 275, 276, plaintiff, who was an employee of the defendant and rightfully on one of the trains operated by it, was injured by a derailment of the train. The effect of the derailment, as evidence of negligence, was discussed in the opinion in the following language:

"The burden of the issue does not shift, but the burden of proof may shift from one party to the other, depending upon the state of the evidence. **When the plaintiff introduces testimony in a case of this kind to the effect that the injury to him was caused by the derailment of a**

train, it is sufficient to carry the case to the jury; but the burden of the issue remains with the plaintiff, though the burden of proof may shift to the defendant in the sense that, if he fails to explain the derailment by proof in the case, either his own or that of the plaintiff, he takes the chance of an adverse verdict, for then the jury may properly conclude that the plaintiff has established the affirmation of the issue as to negligence by the greater weight of the testimony. But the defendant is not required to overcome the case of the plaintiff by a preponderance of the evidence."

In *Duvall v. Receivers, Seaboard Air Line Railway,* 152 N. C., 524 (an action by an employee of defendant arising under the Federal Employers' Liability Act) the State Court held that a presumption of defendant railroad company's negligence was raised from the fact that the injury complained of was received in a head-on collision. The case being carried on writ of error to the U. S. Supreme Court, the writ was dismissed. *Seaboard Air Line R. Co. v. Duvall,* 225 U. S., 477.

See, also, *Stewart v. Railroad,* 137 N. C., 687 (engineer killed in head-on collision); *Wallace v. Power Co.,* 176 N. C., 558 (employee injured by derailment); *Craig, Admr. v. Suncrest Lumber Co.,* 185 N. C., 560 (engineer killed by the engine being derailed and turning over); *Chicago, etc., R. Co., v. Irving* (C. C. A., 9th Circuit), 234 Fed., 562 (passenger killed in railroad wreck caused by derailment of the engine and part of the train; **the defense of the railroad company being, in substance, that it was not responsible for the derailment of its train, but that such derailment was caused by the removal of spikes and angle bars and the displacement of the rail at the point of derailment, and was the work of trespassers or others unknown to it who designed to wreck the train. Held that it was for the jury to say whether the testimony offered by defendant rebutted the prima facie case of the plaintiff**); *Manning v. Chicago, etc., R. Co.,*

135 Minn., 229 (locomotive fireman injured by derailment of engine going 35 miles an hour around a curve); *Connor v. Atchison, etc., R. Co.*, 189 Cal., 1 (the unexplained falling of a railroad bridge causing injury to a trainman); *The Columbia*, 25 Fed. (2d), 516, affirmed (C. C. A., 2nd Circuit), 25 Fed. (2d), 518 (death of ferry boat engineer resulting from explosion of gas bag used in lighting system); *American Glycerine Co. v. Brown* (C. C. A., 5th Circuit), 30 Fed. (2d), 316 (explosion of cans of nitroglycerine causing truck driver's death); *Chesapeake & O. R. Co. v. Smith* (C. C. A., 6th Circuit), 42 Fed. (2d), 111 (break in train line causing injury to brakeman); *Chesapeake & O. R. Co., v. Wells* (C. C. A., 6th Circuit), 49 Fed. (2d), 251 (railroad engineer suing for injuries as a result of explosion of locomotive boiler); *Baltimore, etc., R. Co. v. Hill*, 84 Ind. App., 354, certiorari denied, 273 U. S., 738 (action for death of fireman killed when locomotive left track without apparent cause). **Doctrine of res ipsa loquitur held applicable, throwing burden on defendant to go on with evidence and explain cause of accident to escape inference of negligence arising from circumstances disclosed by evidence);** *Central R. Co. v. Pelusa* (C. C. A., 2nd Circuit), 286 F., 661 (employee operating a crane on a dock killed by the breaking of a boom), *certiorari* denied, 261 U. S., 613.

It has been truly remarked (the truth of the remark being obvious, although it appears in the dissenting opinion of Chief Justice Clark in the *Winslow case*, 147 N. C., 275, 280), that, in derailment cases "it would be difficult in behalf of the deceased or dismembered victim to prove negligence as an independent fact. . . . When he has shown that the injury was caused by derailment or collision he has usually done all that he can do."

This is the exact situation of the parties in the present case. The wreck occurred approximately four miles from Augusta about 3:10 A. M. (folio 285). Receiving the report of the accident soon after it happened, railroad officials

(the superintendent, road master, and wrecking foreman of the C. & W. C. R. Co.) were at the scene of the wreck by 5:30 A. M. (folios 422, 429); and the facts of the derailment were all open to their investigation, before the wreckage had been cleared up. The deceased engineer lived at Florence, S. C., which was almost the width of the state from the place of the derailment; and his family living with him was composed of his mother, over seventy years old at the time, and his three small children, who were respectively 9, 11, and 14 years of age, the testimony being also that two of the children were feeble-minded. What more could these —the old mother and the small children—do than to show that the death of the bread winner of the family had been caused by the derailment?

It is also to be noted in this connection that there is a state statutory requirement (Sec. 4923, Code of 1922) to the effect that notice of railroad accidents is required to be given immediately to the railroad commissioners, by telegraph, telephone, or such other means as may be quickest under the circumstances, at the same time that notice is given the officials of the railroad on which the accident occurred, and that the railroad company shall furnish immediate transportation to the Commissioners to the place of accident. It does not appear from the testimony offered on behalf of defendant whether notice was given to the State Railroad Commission; but if the notice had been given and the representative of the Commission had been present and his findings had corroborated the theory of defendant as to the accident, it may be fairly assumed that testimony to that effect would have been given in the case.

The burden of petitioner's argument is that the faulty alignment of the rail was due to a criminal act; and that the realm of conjecture must be entered to find the cause. The wreck was certainly due to improper setting of a rail that caused a car wheel to strike it and derail the train. Who did it? Was a wrench and claw bar used to take off nuts, draw

spikes **and re-drive** spikes? Did not the jury have the right to express its disbelief that tracks would be seen two days after wreck when so many people had walked over the ground? It was unquestionably the duty of the company to furnish a safe track. Then when we prove it was unsafe and its unsafeness was due to improper repairs, does it excuse as a matter of law to say certain tools were found nearby? We say repairs were made there. They say they were two miles away from there. The jury believed they were **not** two miles away from there. The road master's merely saying he was not there is not conclusive, and if the jury believed that he was there, it was no inference without foundation to say he improperly reset the rail and failed to sufficiently spike it; and if he failed to do that, the company was liable; for that is the work he was doing wherever he was. If the section hands were there when the road master said they were not, the inference is justified that they were "lining and gauging"; and it was an improper "lining and gauging," whether by the section hands or someone else, that caused the wreck; and the circumstances are evidentiary to show that the negligent "lining and gauging" done by the section hands caused the wreck. The evidence from all the circumstances brought out by the testimony was for the jury; and, as was said in *Castle v. Bullard*, 23 How. U. S., 172, 187:

"Circumstances altogether inconclusive, if separately considered, may by their number and joint operation, especially when corroborated by moral coincidences, be sufficient to constitute conclusive proof."

The right of the jury to view with suspicion the testimony given concerning the tools, and to reject the theory that the Southern Railway wrench was used in taking the nuts off the bolts which held the rail in place, finds abundant corroboration in Federal decisions. The wrench was not produced at the trial. The bolts and nuts were not produced at the trial. It was in the power of defendant to produce them. And if they had been so produced, there would have been demonstrative evidence, of unimpeachable character,

that might well have resolved any doubt in the minds of the jury as to whether the wrench found at the wreck had been used in the removal of the bolts. Failure to produce exhibits that would have been of such vital importance as aids to the ascertainment of the truth was, in itself, sufficient to justify the jury in disbelief of the explanation offered by defendant as to the cause of the wreck.

In the case of *Clifton v. United States,* 4 How., 242, 248, it is said:

"It is well observed by Mr. Evans (2 Evans Pothier, 149), in substance, that if the weaker and less satisfactory evidence is given and relied on in support of a fact, when it is apparent to the Court and jury that proof of a more direct and explicit character was within the power of the party, the same caution which rejects all secondary evidence will awaken distrust and suspicion of the weaker and less satisfactory; and that it may well be presumed, if the more perfect exposition had been given, it would have laid open deficiencies and objections which the more obscure and uncertain testimony was intended to conceal."

In *The Frances case,* 8 Cranch, 348, 353, the Court, commenting on the fact that certain letters, which appeared material to the case had not been produced, questioned:

"Why are not these letters produced? It is impossible not to perceive their necessity. . . . Why is no one of these letters produced? It is impossible to account for the fact that no one of these letters is an exhibit in the cause."

In *Brig Struggle v. United States,* 9 Cranch, 71, 74, the declaration with reference to a penal statute is made:

" . . . and if in the course of such vindication he shall pass in silence or leave unexplained circumstances which militate strongly against the integrity of the transaction, he cannot complain if the Court shall lay hold of those circumstances as reasons for adjudging him **in delicto.**"

Even more strongly expressive than the foregoing is the declaration in *Runkle v. Burnham,* 153 U. S., 216, 225, where the Court, speaking through Mr. Justice White, re-

iterates the doctrine of *Clifton v. United States,* that **"the production of weaker evidence when the stronger might be produced lays the producer open to the suspicion that the stronger evidence would have been to his prejudice."**

CONCLUSION

The occurrence of the derailment and the surrounding circumstances permitted an inference of culpability on the part of the defendant; made out plaintiff's *prima facie* case; and presented a question of fact for the defendant to meet with an explanation. Although the plaintiff's case rested wholly on proof of the derailment, the surrounding circumstances and the absence of an explanation, he would at the close of his case, have been entitled to go to the jury on the question of fact thus presented, if no further evidence had been offered. *Plumb v. Richmond Light and Railroad Company,* 233 N. Y., 285. Nor does the testimony of defendant, offered in explanation of the derailment, make out a case coming within the principle of *Chesapeake, etc., R. R. Company,* where, in discussing the testimony given by defendant's witness, the opinion (285 U. S., at page 216) points out that such testimony was not controverted by proof or circumstance, directly or inferentially. There are in the present case, many grounds, as we have endeavored to show in the foregoing discussion for inferences contrary to the theory of defendant and suggesting doubt as to its testimony. The case is one, therefore, which falls directly within the rule declared in *Gunning v. Cooley* (281 U. S., 94), that **"issues that depend on the credibility of witnesses and the effect or weight of evidence are to be decided by the jury."**

It is therefore respectfully submitted that the petition for a writ of *certiorari* should be denied.

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STATE OF SOUTH CAROLINA,
County of Richland. } ss.

R. E. Whiting, who being duly sworn makes oath and says: That he mailed by United States registered mail copies of the foregoing brief in opposition to petition for writ of *certiorari*, to counsel of record for appellant on the 19th day of November, 1931.

R. E. WHITING.

Sworn to and *subscribed* before
me this 19th day of November, 1931.

.....

Notary Public for South Carolina,
My Commission Expires at the Pleasure of the Governor.